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JAMES R. BROWNING, C

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958.

No. 883

EMBRY BROTHERS, INC.,
JAMES DRURY, - - - - - - - - Petitioners,

versus

HOWARD L. DAVIS,
CITIZENS FIDELITY BANK & TRUST COMPANY,
UNITED STATES OF AMERICA, - Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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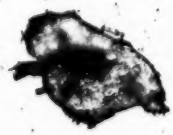

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EMBRY BROTHERS, INC.,
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v.

HOWARD L. DAVIS,
CITIZENS FIDELITY BANK & TRUST COMPANY,
UNITED STATES OF AMERICA, - - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Justices of the Supreme Court of the United States:

Petitioners, Embry Brothers, Inc., and James Drury pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on October 10, 1958.

OPINIONS BELOW.

No opinions have been reported or filed in this case by either the United States District Court for the Western District of Kentucky nor by the United States Court of Appeals for the Sixth Circuit. The Record contains Findings of Fact and Conclusions of Law (Appendix 5, pages 23a-29a) and Judgment (Appendix 6, pages 30a-31a) by the District Court, and Judgment (sixth unnumbered page (third sheet) following page 31a) and Order Denying Rehearing (fourth page (second sheet) following page 41a) by the Circuit Court of Appeals. The Judgment and the Order Denying Rehearing (by the Court of Appeals) are reprinted in Appendix A, *infra,* page 13.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 10, 1958. A timely petition for rehearing was denied February 4, 1959. The jurisdiction of this Court is invoked under 28 U. S. C., Secs. 1332; 1335; 1397, and Rule 22, Federal Rules of Civil Procedure.

QUESTIONS PRESENTED.

1. Where a prime contractor, employed on United States Army construction, contracts to pay a subcontractor by joint checks made out to him and suppliers of materials, do such suppliers have a contractual or equitable right to be paid by the prime contractor out of funds due jointly to the subcontractor and them-

selves ahead of creditors of the subcontractor whose claims rest upon:

a. A written assignment by subcontractor of the *chose in action* to secure a pre-existing debt?

b. Withholding and excise taxes assessed against the general estate of the subcontractor?

2. Whether a prime contractor on a Government project who has been sued by a subcontractor on a subcontract can pay money into court by way of a settlement and be released from liability to the laborers and materialmen of the subcontractor by interpleading them without the said laborers and materialmen being paid, although the subcontract provided that the prime contractor would pay materialmen and laborers by issuing joint checks to the subcontractor and materialmen?

STATUTES INVOLVED.

The pertinent provisions of the Miller Act, 49 Stat. 793, 40 U. S. C. A. 270 a-d, are set out in Appendix B, *infra*, page 14.

STATEMENT OF THE CASE.

Howard L. Davis executed on February 16, 1952, a subcontract for certain construction work on a United States Army installation at Fort Campbell, Kentucky, with J. W. Bateson Company, Inc., the prime contractor.

On July 2, 1952, Davis leased from Embry Brothers, Inc., certain equipment and likewise leased certain

equipment from James Drury. All of said leased equipment was used by Davis in the performance of his subcontract with Bateson.

On or about October 8, 1952, Bateson terminated his contract with Davis. On December 11, 1952, Davis filed the present action in the District Court against Bateson for breach of contract. James Drury demanded payment from Bateson for the use of his equipment on said Government project. Bateson refused to pay him, claiming the matter was in litigation.

On January 23, 1953, Davis made a written assignment to the Citizens Fidelity Bank & Trust Company for a pre-existing debt of $9,000.00 out of the proceeds to be recovered in this action. This debt was incurred prior to the subcontract with Bateson.

On March 2, 1953, the United States assessed withholding and excise taxes against Davis and in August and September, 1953, assessed further excise taxes against Davis.

On July 31, 1956, Davis and Bateson effected a compromise settlement under which Bateson paid into the District Court $20,000.00 there to abide the judgment and further orders of the Court.

On September 7, 1956, J. W. Bateson Company, Inc., filed a Second Amended Answer and Interpleader (Appendix 1, pages 9a-15a) and prayed to be discharged from any further liability to the Petitioners (*Ibid.*, pages 12a, 15a).

On September 27, 1956, Embry Brothers, Inc., filed an Answer to Interpleader and Cross-Claim (Appendix 2, pages 16a-18a) praying for a judgment in the sum of

$1,128.80 with interest thereon from October 29, 1952 (*Ibid.*, page 18a), and on January 16, 1957, James Drury filed an Answer to Interpleader and Cross-Claim (Appendix 3, pages 19a-20a) praying for a judgment of $725.00 with interest at 6% per annum from the 6th day of April, 1952 (*Ibid.*, page 20a).

On or about December 6, 1956, the District Court held that all counsel for Davis, including present counsel for the bank, had a prior and superior lien for their attorney's fees (Appendix 5, paragraph 5, page 26a).

The District Court held that after the deduction of Davis' attorneys' fees, the bank had an equitable lien on the balance of the fund by virtue of the assignment dated January 23, 1953, prior and superior to the lien of the United States; that the tax lien of the United States was superior to the claims of Embry Brothers, Inc., and Drury; and that Embry Brothers, Inc., and Drury were general creditors (*Ibid.*, paragraphs 1-3, page 29a).

Petitioners had a cause of action against Bateson, the prime contractor, as third-party beneficiaries under the subcontract (Appendix 7, pages 32a-41a). The District Court by its order discharged Bateson from any further liability to the Petitioners (Table of Relevant Docket Entries, 12-3, 1956, Appendix, page 3a), and then turned over the fund Bateson had paid into Court for this purpose to other creditors of Davis, preferring strangers to those who had helped to produce the fund. This is the injustice sought to be redressed by this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

There are three important reasons for granting the writ in this case.

1. This Court has not previously defined the rights of laborers and materialmen who furnish labor and materials to a subcontractor on a Government construction project as regards priority of their claims to payment out of funds due the subcontractor from the prime contractor.

2. The decision of the Court below in affirming the judgment of the District Court abrogated the terms of a written contract between the prime contractor and subcontractor by diverting funds due to be paid jointly to the subcontractor and suppliers of materials, and applying them to pay other creditors of the subcontractor.

3. It should be decided if the equitable liens doctrine in Henningsen v. United States Fidelity & Guaranty Company, 208 U. S. 404, 28 S. Ct. 389, 52 L. Ed. 547, is limited to funds in which the United States has an interest or over which it can exercise control, rather than applying to all payments flowing from the construction, as an equitable principle of general application.

The reasons are interrelated, so they will be considered together:

The Government is under no legal obligation to pay laborers and materialmen, but it is under an equitable obligation to do so. U. S. v. Munsey Trust Company

(1947), 332 U. S. 234, 67 S. Ct. 1599, 91 L. Ed. 2022; National Surety Corporation v. U. S. (1955), 132 Ct. Clms. 724, 133 F. Supp. 381. To meet this moral obligation, and as a substitute for a mechanics lien statute, Congress passed the Act of 1894, 28 Stat. 228, known as the Heard Act, which was amended from time to time, and finally on August 24, 1935, 40 U. S. C. A., Secs. 270 a, b and c became the present Miller Act. Section 270a(a)(2) of the Act says that the payment bond shall provide for the protection of "all persons supplying labor and material in the prosecution of the work provided for" in the primary contract. This Court decided that Congress meant by this statement first and second tier subcontractors, that is, subcontractors in immediate contractual relationship with the prime contractor, and labor or materialmen supplying such subcontractors. MacEvoy v. United States for the use and benefit of Calvin Tomkins Co. (1944), 322 U. S. 102, 64 S. Ct. 890, 88 L. Ed. 1163. Petitioners are materialmen supplying such a subcontractor. Brogan v. National Surety Company (1918), 246 U. S. 257, 38 S. Ct. [illegible], 62 L. Ed. 703; U. S. v. S. Birch & Sons Construction Company (1941), 43 F. Supp. 726; U. S. v. Castro (1947), 71 F. Supp. 36; Indemnity Insurance Company of North America v. Browning-Ferris Machinery Company (1955), 227 Fed. 2d 804; Continental Casualty Company v. Clarence L. Boyd Company (1944), 140 Fed. 2d 115, 116; U. S. v. Chester Construction Company (1939), 104 Fed. 2d 648, 649.

Under the Miller Act (U. S. C. A. 270b(a)) this latter class of second tier subcontractors, namely, materialmen and laborers, must give notice of their claim to the prime contractor within 90 days from the date on which they furnish their last material or do their last work, where there is no contractual relationship express or implied. The petitioners had a contractual relationship as third party beneficiaries. The purpose of the notice provision is to enable the prime contractor to use funds he has not paid the subcontractor in order to secure himself against the claims of unpaid laborers and materialmen.[1]

This 90 day notice requirement is sufficient if there is a writing from which it plainly appears, in connection with oral testimony, that the nature and amount of the indebtedness was brought home to the general contractor.[2] The prime contractor had such notice in the instant case, as the subcontract (Appendix 7, page 38a) provided that by the fifth of the month, the subcontractor will present an itemization of all actual costs for the preceding month (*see also,* Appendix 4, page 21a).

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[1]In this respect it has the same purpose as the notice provision in mechanics lien laws. United States for the use of J. H. Welch Co. v. Fleisher Engineering and Construction Co., 30 F. Supp. 961 (D. C. N. Y., 1939); United States for the use of Bruce Co. v. Fraser Construction Co., 87 F. Supp. 1 (W. D. Ark., 1949); United States for use of John A. Denie's Sons Co. v. Bass, 111 Fed. 2d 965 (6th Cir., 1940); United States for the use of Hargis v. Maryland Casualty Co., 64 F. Supp. 522 (Cal., 1946).

[2]Houston Fire and Casualty Insurance Co. v. United States for the use of Trane Co., 217 Fed. 2d 727 (5th Cir., 1954); Coffee v. United States for the use of Gordon, 157 Fed. 2d 96[8] (5th Cir., 1946).

But the Miller Act is not an exclusive remedy. Belknap Hardware and Manufacturing Company v. Ohio River Contract Company (1921), 271 Fed. 144, 146; Socony-Vacuum Oil Company v. Continental Casualty Company (1955), 219 Fed. 2d 645, 650. Thus, petitioners had an election of remedies, as follows:

1. To proceed under the Miller Act against Bateson's surety.
2. To proceed against Bateson for their share of funds due to be paid jointly to petitioners and Davis.
3. To proceed against Davis as trustee of funds due petitioners from Bateson, and as general creditors of Davis.
4. A combination of 2 and 3.

Now, suppose they had chosen course numbered 1? The result would have been that Bateson's surety would have paid the Petitioners, and would have been subrogated to petitioners to collect from Bateson out of funds due Davis. Henningsen v. U. S., *ubi supra;* Belknap Hardware and Manufacturing Company v. Ohio River Contract Company, *supra;* In re P. McGarry & Son (1917), 240 Fed. 400; Greenville Savings Bank v. Lawrence (1896), 76 Fed. 545; Cox v. New England Equitable Insurance Company (1917), 247 Fed. 955; Philadelphia National Bank v. McKinley (1934), 72 Fed. 2d 89, cert. denied, 293 U. S. 583, 55 S. Ct. 96; American Surety Company of New York v. Westinghouse Electric Manufacturing Company, 296 U. S. 133, 56 S. Ct. 9, 80 L. Ed. 105. The resulting

reduction of retained funds due Davis in Bateson's hands would have diminished the recovery of respondents. Should a different result attend the pursuit of course numbered 3, above, the election actually made after Bateson had made joint payment by way of interpleader?

As a general proposition, an election of remedies does not alter the substantive rights of the parties, and the holdings of the Courts below err in this respect. The remedy actually pursued by petitioners should have directly diminished the fund available for payment of respondents' claims to exactly the same extent as a proceeding under the Miller Act would have indirectly done, for the following reasons:

a. Petitioners were third-party beneficiaries or "creditor beneficiaries" under the contract between Bateson and Davis. Restatement of the Law of Contracts, Sec. 133; Socony-Vacuum Oil Co. v. Continental Casualty Co., 219 Fed. 2d 645; *see also,* Jackson Lumber Co. v. Union Transfer and Storage Co. (1932), 246 Ky. 653, 55 S. W. 2d 670; Wilmington Housing Authority v. Fidelity and Deposit Co. (Del. 1946), 47 A. 2d 524, 170 A. L. R. 1288.

b. Those responsible for the physical completion of building contracts have an equitable claim to be paid from available moneys ahead of others whose claims come from the advance of money. U. S. v. Munsey Trust Co., 332 U. S. 234, 240, 67 S. Ct. 1599, 1602, 91 L. Ed. 2022., 2028; *see also,* Henningsen v. U. S.; Belknap Hardware and Manufacturing Co. v. Ohio River Contract

Co., and other cases hereinabove cited; to the same effect, *see*, Seaboard Surety Co. v. Spear (1941), 119 Fed. 2d 849.

Under either view of petitioners' claims, Bateson was bound to pay them in preference to paying Davis; Davis could not have assigned to the Respondent bank any greater right than he held, nor could the Government's tax liens have reached any funds not unconditionally due him. To hold otherwise, as the District Court and Court of Appeals have done, disregards both settled law and the announced policy of Congress, as well as impairing the obligation and abrogating the term of a written contract.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A".

JUDGMENT.

(Filed October 10, 1958)

This cause has been heard and considered upon the oral arguments and briefs of attorneys for the parties and upon the record in the case.

And it appearing that the findings of fact of the District Judge Brooks are supported by substantial evidence and are not clearly erroneous, and that his conclusions of law rest upon a sound basis;

The judgment of the District Court is affirmed, and it is so ordered.

ORDER DENYING REHEARING.

(Filed February 4, 1959)

The court has considered appellants' petition for rehearing which closes with the following: "We beg of the Court to give this case careful consideration, even though the amount involved is small, in the interest of justice and good conscience." In justice and good conscience the court has already given this case careful consideration. The petition for rehearing contains argument that is cumulative and repetitious in relation to that presented in support of the prior appeal.

The petition for rehearing is denied.

APPENDIX "B".

Miller Act, 49 Statute 793.

U. S. C. A. 270a(a)(2). A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. • • •

U. S. C. A. 270b(a). • • • *provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, • • •.

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v.

HOWARD L. DAVIS, CITIZENS FIDELITY BANK & TRUST COMPANY, and UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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v.

HOWARD L. DAVIS, CITIZENS FIDELITY BANK & TRUST COMPANY, and UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 23a-29a) are not officially reported. The order of the Court of Appeals, affirming the judgment of the District Court, is reported at 260 F. 2d 356.

JURISDICTION

The judgment of the Court of Appeals was entered on October 10, 1958, and a petition for rehear-

ing was denied on February 4, 1959. (Pet. 13.) The petition for a writ of certiorari was filed on May 1, 1959. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether United States liens for unpaid taxes owed by a subconstractor are entitled to priority, over the adverse claims of lessors of trucks used by the subcontractor in performing his contract, in a fund paid by the prime contractor in settlement of a suit for breach of contract.

STATUTES INVOLVED

Sections 3670, 3671 and 3672(a) of the Internal Revenue Code of 1939 and Sections 1 (a)(2) and 2 (a) and (b) of the Act of August 24, 1935 are set forth in the Appendix, *infra*, pp. 9-12.

STATEMENT

On February 16, 1952, Howard L. Davis (hereinafter called the taxpayer or the taxpayer-subcontractor) executed a subcontract, for construction work on a United States Army installation in Kentucky, with J. W. Bateson Company, Inc. (hereinafter called Bateson). On October 8, 1952, Bateson terminated the contract and the taxpayer, individually, filed this action in the District Court against Bateson for damages for breach of the contract. (R. 23a.)

On July 31, 1956, the taxpayer and Bateson effected a compromise under which Bateson paid into the District Court $20,000 (hereinafter called the

fund), to be distributed in accordance with further orders of the court. Certain assignees, asserted lienholders, and creditors of the taxpayer claimed interests in the fund, and Bateson interpleaded, among others, the Citizens Fidelity Bank & Trust Company (hereinafter called the Bank or Citizens Fidelity), the United States, and Embry Brothers, Inc., each of whom claimed an interest in the fund. (R. 23a.)

On January 23, 1953, the taxpayer, in consideration of the Bank's forbearing to institute litigation against him to recover the unpaid balance of $8,554.44 and interest on his past due note made to the order of the Bank, had signed, executed and delivered to the Bank a written assignment conveying to it all of his right, title and interest in and to the first $9,000 to be recovered by him out of the proceeds of his recovery in the present action. On February 10, 1953, the Bank had notified Bateson Company of the assignment. (R. 23a-24a.)

On July 2, 1952, Embry Brothers, Inc., had leased to the taxpayer-subcontractor certain equipment. The taxpayer thereafter defaulted on the lease and abandoned the equipment, which was repossessed by Embry Brothers, Inc. That corporation asserts an equitable lien on the fund in the amount of $1,128.80, with interest from October 26, 1952. James Drury asserts a claim in the amount of $725, and interest thereon from April 6, 1952, which claim arises from similar facts. (R. 25a-26a.)

On March 2, 1953, and in August and September of that year the United States assessed withholding

and excise taxes against the taxpayer in the total amount of $12,044.32. The United States claims that amount, with interest, out of the fund under the provisions of Sections 3670, 3671 and 3672(a) of the Internal Revenue Code of 1939. (R. 25a.)

On or about December 6, 1956, the District Court found that counsel for the taxpayer was entitled to $6,666.66 to be paid out of the fund. This finding is not contested, and it reduces the amount of the fund in question to $13,333.34. (R. 26a.)

On August 16, 1957, the District Court held that the relative priorities of the various claims to the fund are as follows (R. 29a): First that Citizens Fidelity by virtue of the assignment dated January 23, 1953, has a lien that is prior and superior to the tax liens of the United States; secondly, that the tax liens of the United States are superior to the claims of Embry Brothers, Inc., and James Drury; and thirdly, that Embry Brothers, Inc., and James Drury have no lien on the funds in court. The Court of Appeals, by an order entered October 10, 1958, affirmed the judgment of the District Court. (Pet. 13.) Petition for rehearing was denied February 4, 1959. (Pet. 13.)

ARGUMENT

1. The fund interpleaded represents an amount paid in compromise of taxpayer's suit against the prime contractor for breach of contract. After awarding others priority in the $20,000 interpleaded, the court rendered judgment to the United States upon its tax claims for the balance—$4,333.34. A federal tax lien in excess of this amount arose on

March 2, 1953[1] (R. 25a), and attached on that date to the taxpayer's right of action against the prime contractor. *United States* v. *Kings County Iron Works*, 224 F. 2d 232 (C.A. 2). While such a tax lien is not valid against mortgagees, pledgees, purchasers and judgment creditors unless proper notice is filed (Section 3672(a), Internal Revenue Code of 1939 (Appendix, *infra*, p. 9)), as to all other claimants the tax lien is perfected on the date it arises, and Section 3672 affords no protection. *United States* v. *Scovil*, 348 U.S. 218; *United States* v. *Security Tr. & Sav. Bk.*, 340 U.S. 47, 51 (concurring opinion). The doctrine of first in time, first in right, applies only to specific and perfected liens and has no application where a federal tax lien, which is perfected on the date it arises, and an adverse inchoate lien are involved. *United States* v. *New Britain*, 347 U.S. 81. A mechanic's lien is an inchoate lien up to the time that the necessary steps have been taken to perfect it. *United States* v. *Vorreiter*, 355 U.S. 15, reversing 134 Colo. 543; *United States* v. *White Bear Brewing Co.*, 350 U.S. 1010, rehearing denied, 351 U.S. 958, reversing 227 F. 2d 359 (C.A. 7); *United States* v. *Colotta*, 350 U.S. 808, reversing 79 So. 2d 474 (Miss.).

Indeed, here petitioners do not even stand upon an inchoate mechanic's lien. Their claims are based upon Sections 1(a) and 2(a) and (b) of the Act of August 24, 1935 (Appendix, *infra*, pp. 10-12), otherwise known as the Miller Act. That Act gives an un-

[1] Other tax liens arose in August and September, 1953. (R. 25a.)

paid materialman who supplies material for construction on Government property a right of action against the surety on the payment bond supplied by the contractor. The courts below correctly held (R. 28a-29a) that the Miller Act does not create liens, and that petitioners are but general creditors of the taxpayer with no lien upon the funds in court.[2]

Petitioners' assertion that they hold equitable liens which relate back to accord them priority over the federal tax liens is without merit. The doctrine of relation does not apply against the United States. *New York* v. *Maclay*, 288 U.S. 290; *United States* v. *Security Tr. & Sav. Bk., supra; United States* v. *Hulley*, 358 U.S. 66, reversing 102 So. 2d 599 (Fla.).[3] And see *United States* v. *Morrison*, 247 F. 2d 285 (C.A. 5), wherein the court states (p. 289) in reference to a vendor's lien:

> * * * while once established by judgment under the doctrine of relation back, it has a high order in the state hierarchy, until the act of judgment

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[2] Although some of the cases cited by the petitioners (Pet. 9) hold that in equity materialmen may have a preference over other *general creditors*, none holds that they take priority over other lienors expressly recognized as such under statutory enactments or at common law. See, for example, *Belknap Hardware & Mfg. Co.* v. *Ohio River C. Co.*, 271 Fed. 144 (C.A. 6). Indeed, that case, which is one upon which the petitioners rely (Pet. 9), was decided by the same court which decided the instant case.

[3] It is to be noted that the District Court here held that taxpayer's assignment to the bank related back. This, we submit, was error. What occurred was an assignment by taxpayer to the bank *pro tanto* of his existing right of action against the prime contractor.

occurs, it is, in the Federal view, as contingent as any other lawsuit.

2. Nor is there merit to the petitioners' contention, raised for the first time in petition for rehearing, that the decisions below divert funds due to be paid jointly to the taxpayer and petitioners.[4] The fund involved represents payment in compromise of taxpayer's suit against the prime contractor for breach of contract. The measure of damages in such a case is the amount of profits lost, or *quantum meruit*, the option being with the plaintiff. 1 Restatement of the Law of Contracts, Sec. 346; *Hoefflin* v. *Wilkerson*, 184 Ky. 484. It is clear that the provision in the contract for joint payment to materialmen "for all materials furnished" does not apply in favor of the petitioners who merely rented trucks to the taxpayer. In any event, as previously discussed, the fund in question was not paid pursuant to the contract, but was paid for the injury resulting to the taxpayer from the prime contractor's termination of the subcontract.

3. Even if it be determined, as petitioners contend, that they have a claim superior to that of the Citizens Fidelity Bank & Trust Company, whose claim has been held to be superior to the federal tax liens, no reduction would follow in the amount distributable to the United States. *United States* v. *New Britain*, *supra*. The so-called "circuity of liens" rule would apply. The United States would be entitled to receive

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[4] The provision of the contract to which petitioners evidently refer is found for the first time in the printed record in an appendix printed to their petition for rehearing.

first payment from the fund after an amount sufficient to pay the bank's claim had been set aside; and the petitioners would have to look for payment to the amount set aside for the bank. See *Spokane County* v. *United States*, 279 U.S. 80, 91; *Hopkins* v. *Eureka Coal Co.* (C.C. Kanawha Co., W.Va.), decided February 25, 1944 (33 A.F.T.R. 1627).

CONCLUSION

The decision below is correct. There is no conflict. The petition for certiorari insofar as it involves the federal tax claims should be denied.

Respectfully submitted,

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MAY, 1959.

APPENDIX

Internal Revenue Code of 1939:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 3671.)

SEC. 3672 [As amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*— Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(26 U.S.C. 3672.)

Act of August 24, 1935, c. 642, 49 Stat. 793:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

* * * * *

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

* * * * *

(40 U.S.C. 270a.)

SEC. 2. (a) Every person who has furnished labor or material in the prosecution of the work

provided for in such contract, in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however*, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States

for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.

(40 U.S.C. 270b.)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959.

No. 883

EMBRY BROTHERS, INC., and
JAMES DRURY,

Petitioners,

versus

HOWARD L. DAVIS,
CITIZENS FIDELITY BANK AND TRUST COMPANY,
UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR CITIZENS FIDELITY BANK AND TRUST COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1959.

No. 883

EMBRY BROTHERS, INC., and
JAMES DRURY, - - - - - - *Petitioners,*

v.

HOWARD L. DAVIS,
CITIZENS FIDELITY BANK AND TRUST COMPANY,
UNITED STATES OF AMERICA, - - - *Respondents.*

BRIEF OF CITIZENS FIDELITY BANK AND TRUST COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The Petition for Certiorari should be *denied* because the conclusions of law of the District Court, summarily affirmed by the Court of Appeals for the Sixth Circuit, are correct, conform to the laws of Kentucky, and do not conflict with any general principles of equity jurisprudence.

The Petitioners raise no questions of the character indicated in Rule 19 of the Revised Rules of the Supreme Court of the United States (adopted April 12, 1954).

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW.

Citizens Fidelity Bank and Trust Company (hereafter called Citizens Fidelity) is dissatisfied with the Petitioners' presentation of the questions presented for review and hereby make its own Counter-Statement of Questions presented.

In April and July, 1952, respectively, the two Petitioners, Embry Bros., Inc. and James Drury (hereafter collectively called Embry Bros.), leased certain trucks and tractor equipment to Howard L. Davis (hereafter called Davis), a subcontractor for J. W. Bateson Company (hereafter called Bateson), a general contractor holding a large contract with the United States Army.

Litigation developed between Bateson and Davis and resulted in a compromise under which Bateson paid $20,000 into the United States District Court for the Western District of Kentucky in full settlement of the litigation. Certain payments (not now in issue) were made from this fund and there remained in the United States District Court a net balance of $13,333.34.

Davis had previously assigned, for a valuable consideration, a portion of the fund to Citizens Fidelity. He also owed substantial taxes to the United States. The total of the amount assigned and of the taxes due exceeded the balance remaining in the fund.

Embry Bros. claimed an *equitable lien* on the balance in the fund superior to the valid assignment

to Citizens Fidelity and to the tax lien of the United States.

The sole question presented is whether the District Court of the United States and the Court of Appeals of the United States for the Sixth Circuit are in *such error in a matter of such importance* as to warrant review by certiorari in holding that

(1) *Neither* the Miller Act [49 Stat. 793, *et seq.*; Title 40 U. S. C.; 40 U. S. C. A., §§ 270(a)-(d)] *nor* any Kentucky Statute *nor* the Common law created an equitable lien on the fund for the benefit of a person (Embry Bros.) leasing equipment to a subcontractor (Davis) of a general contractor (Bateson) holding a contract with the United States Army; and

(2) The Lessor (Embry Bros.) of such equipment was no more than a general creditor of the subcontractor (Davis).

COUNTER-STATEMENT OF THE CASE.

[The District Court's Findings of Fact]*

1. "On February 16, 1952, Howard L. Davis (hereafter called Davis), executed a subcontract for certain construction work on a United States Army installation in Kentucky with J. W. Bateson Company, Inc. (hereafter called Bateson), a corporation, with its principal office in Texas. On or about October 8, 1952, Bateson terminated its contract with Davis. On De-

*R. 23a-26a.

cember 11, 1952, Davis filed the present action in this court against Bateson for damages for breach of contract.

On July 31, 1956, Davis and Bateson effected a compromise settlement under which Bateson paid into this court $20,000 (hereafter called the Fund) there to abide the judgment and further orders of this Court. Certain assignees, asserted lienholders and creditors of Davis thereupon claimed various interests in the Fund, and on September 7, 1956, Bateson interpleaded, among others, Citizens Fidelity Bank and Trust Company (hereafter called Citizens Fidelity), the United States of America and Embry Bros., Inc. each of whom claimed varying interests in the Fund.

2. On August 8, 1952, a $15,000 promissory note previously executed by Davis to the order of Citizens Fidelity became due and payable and Davis failed to pay the remaining $9,000 balance then due and owing on the note. Thereafter, Davis made a payment of $445.56 on his past due promissory note and reduced the unpaid principal balance to $8,554.44. Citizens Fidelity demanded payment of the unpaid balance and notified Davis that it intended to take legal action against him to recover the balance. On January 23, 1953, Davis, in consideration of Citizens Fidelity forbearing to institute legal action against him for the remaining unpaid principal balance of $8,554.44 and interest, signed, executed and delivered to Citizens Fidelity a written assignment whereby he conveyed to Citizens Fidelity all of his right, title and interest in and to the first $9,000 to be recovered by him out of the

proceeds of his recovery in the present action then pending against Bateson.* On February 10, 1953, Citizens Fidelity notified Bateson of such an assignment, and the notice of assignment was acknowledged. The assignment is as follows:

> "KNOW ALL MEN BY THESE PRESENTS, that *Howard L. Davis,* a resident of Clark County, State of Indiana, hereinafter called the 'Assignor', in order to secure to *Citizens Fidelity Bank and Trust Company* of Louisville, Kentucky, hereinafter called the 'Assignee', payment of the sum of Eighty-five Hundred Fifty Four and 44/100 Dollars ($8554.44), representing the balance due Assignee on a promissory note in the original amount of $9000.00, plus interest thereon at the rate of 6%, which amount is justly owing by the Assignor to the Assignee, hereby
>
> "SELLS, ASSIGNS, TRANSFERS AND SETS OVER TO Assignee all and singular:
>
> (1) The First $9000.00 of the proceeds that Assignor may recover in the cause entitled 'Howard L. Davis vs. J. W. Bateson Company, Incorporated, cause No. 2527 in the United States District Court for the Western District of Kentucky, Louisville, Kentucky.'

*Embry Bros. *omits to* state that after the $15,000 promissory note became past due and was not paid Citizens Fidelity *demanded payment of the unpaid balance and notified Davis that it intended to take legal action against him to recover the balance* and that Davis, in *consideration of Citizens Fidelity forbearing to institute legal action against him for the remaining unpaid principal balance of $8,554.44 and interest* executed the written assignment [Findings of Fact (R. 24a); Affidavit of Arthur G. Baumann (R. 1b); Supplementary Affidavit of Arthur G. Baumann, (R. 3b)].

(2) Additional proceeds of said judgment that might be needed to pay off the balance due under said promissory note as a result of the accumulation of interest thereon.

"UPON CONDITION, HOWEVER, that upon the payment to the Assignee of the said sum of $8554.44 plus interest due under the terms of said note in full either from the proceeds of said judgment and/or from any other source or sources, this assignment shall be null and void, and the Assignee shall, thereupon, reassign, without recourse, to the Assignor, the amount of said proceeds then remaining uncollected.

"And, until the happening of the contingencies specified in the aforesaid condition, the Assignor hereby empowers the Assignee to collect and receive the amount of said proceeds assigned herein."

3. On March 2, 1953, the United States assessed withholding and excise taxes against Davis in the amount of $4,633.72, and in August and September, 1953, assessed further withholding and excise taxes of $5,136.82 and $232.89 against Davis. The United States claims $12,044.32, with interest, out of the Fund under the provisions of Sections 3670, 3671 and 3672(a) of the Internal Revenue Code of 1939.

4. On July 2, 1952, Embry Bros., Inc., leased to Davis certain equipment at an agreed rental of $8,270 payable in monthly installments of $344.58. Davis thereafter defaulted on the lease and abandoned the equipment which was repossessed by Embry Bros., Inc. Embry Bros., Inc., is asserting an equitable lien in the amount of $1,128.80, with interest from October

26, 1952, against the Fund, and James Drury is asserting a claim in the amount of $725 and interest thereon from April 6, 1952, which arises from facts similar to those on which the claim of Embry Bros., Inc. is founded.

5. On or about December 6, 1956, this Court found that counsel for Davis held a prior and superior lien for their attorneys' fees in a total amount of $6,666.66 to be paid out of the Fund, and the amount in the Fund was thereby reduced to, and presently amounts to, $13,333.34."

After a full hearing on the priority of the respective claims of Citizens Fidelity, the United States and Embry Bros. against the balance of $13,333.34 remaining in the Fund (R. 5a) the District Court, in its Discussion and Conclusions of Law (R. 26a-29a) found that (1) Citizens Fidelity held a prior assignment and lien against $9,000 out of the Fund; (2) the United States held a tax lien on the balance of the Fund (as the amount of the tax lien exceeded the balance left in the Fund); and (3) Embry Bros. were general creditors and held no lien whatever on the Fund.

On September 4, 1957, the District Court entered its Judgment pursuant to its decision.

On October 10, 1958, this judgment was *affirmed* by the United States Court of Appeals for the Sixth Circuit.

On February 4, 1959, the Petitioners' petition for rehearing was denied.

ARGUMENT.

FIRST POINT.

No Special and Important Reasons Exist for Granting a Reveiw on Writ of Certiorari.

The judgment of the District Court, summarily affirmed by the United States Court of Appeals for the Sixth Circuit, involved solely a question of the relative priorities between a bank, the United States and a lessor of equipment to a fund paid into Court in settlement of litigation between a contractor and his subcontractor. The District Court found that the claim of the Bank was superior to the tax claim of the United States, and that the claims of the Bank and of the United States were both superior to the claim of the equipment lessor. The United States was satisfied with this decision and did not appeal. On an appeal by the equipment lessor to the United States Court of Appeals, the judgment of the District Court was summarily affirmed. The equipment lessor filed a petition for rehearing which was denied.

The decision of the United States Court of Appeals did *not* conflict with the decision of another United States Court of Appeals on the same matter; it did *not* decide an important state question in a way in conflict with applicable state law; it did *not* decide an important question of Federal law which had theretofore not been settled by this Court; it did *not* decide a Federal question in a way in conflict with any decision of this Court; it did *not* depart from any accepted

course of judicial proceeding; and the question it decided was *not* one of great public or private importance.

SECOND POINT.

Where Federal Jurisdiction Is Based on Diversity of Citizenship, the Petitioners Cannot Demand That a United States Court Create an Equitable Lien Not Provided by Act of Congress and Not Allowed Under Kentucky Law.

1. The rule of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, required the United States Courts below (a) to apply any applicable Federal statute or (b) to follow the law of Kentucky.

The Petitioners in their briefs and argument in the Court of Appeals and in their Petition for Rehearing urge the courts of the United States to (i) disregard the provisions of The Miller Act [49 Stat. 793, *et seq.*; 40 U. S. C.; 40 U. S. C. A., §§ 270(a)-(d)], and the common law and statutes of Kentucky, and (ii) create a new theory of an equitable lien so as to prefer two unsecured general creditors to an assignee for value and to a valid tax claim of the United States.

Any application by a United States Court of the novel "equitable" theory demanded by Petitioners (i) would completely alter well established principles governing the priority of conflicting rights to a private fund of money in violation of the laws of Kentucky, and (ii) would be completely contrary to this Court's ruling in *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64; *Guaranty Trust Co.* v. *York*, 326 U. S. 99; and *West* v. *A. T. & T. Co.*, 311 U. S. 223, 237.

In the *Guaranty Trust Co.* case, *supra,* this Court said (at page 109):

> "* * * Erie R. Co. v. Tompkins was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies Erie R. Co. v. Tompkins is that for the same transaction the accident of a suit by a nonresident litigant in a federal court instead of a State court a block away should not lead to a substantially different result."

In the *West* case, *supra,* this Court said:

> "Since the equitable relief sought in this suit is predicated upon petitioners' legal rights growing out of respondent's unlawful transfer of the stock to the assignee of the life tenant, the state 'laws' which, by § 34 of the Judiciary Act of 1789, c. 20, 28 U. S. C., § 725, are made 'the rules of decision in trials at common law' define the nature and extent of petitioners' right. See Russell v. Todd, 309 U. S. 280, 289. And the rules of decision established by judicial decisions of state courts are 'laws' as well as those prescribed by statute. Erie Railroad Co. v. Tompkins, *supra,* 78. True, as was intimated in the Erie Railroad case, the highest court of the state is the final arbiter of

what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted. See Wichita Royalty Co. v. City National Bank, 306 U. S. 103, 107. But the obvious purpose of § 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship. That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken."

2. The Miller Act [49 Stat. 793, *et seq.*; 40 U. S. C.; 40 U. S. C. A. §§ 270(a)-(d)] is the only applicable Federal statute. It does not create, and does not purport to create, any lien in favor of the Petitioners.

The Miller Act provides that in certain contracts with the United States the contractor shall furnish a *payment bond* "for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person". The Act provides that every person who has furnished labor or material under such a contract and who has not been paid in full therefor shall have the right to *sue in the name of the United States* on the payment bond. It also provides that subcontractors shall have a right of action *upon the payment bond* on their giving written notice to the contractor.

Neither the Miller Act itself, nor the decisions interpreting it, create any lien in favor of the contractor or subcontractor for whose protection the *payment bond* provisions of the Act are designed.

The claim asserted by Embry Bros. is *not* an action on a Miller Act payment bond and is *not* an action *relating to funds over which the United States has any control.* It is solely an action attempting to establish a prior lien on a fund paid into Court in compromise of litigation for breach of contract between a contractor and a subcontractor. The District Court* fully recognized this and disposed of the Embry Bros. claim in the following words:

> "* * * There is no authority to support their (Petitioners') contention that the 'rather vague obligation' stated in Belknap Hardware and Manufacturing Co. v. Ohio River Contracting Co., 271 Fed. 144 (6th Cir.) as being assumed by the United States to look after the interests of laborers and materialmen and which is referred to in United States v. Munsey Trust Co., 332 U. S. 234, page 240, as the 'peculiarly equitable claim', has any application to funds in which the United States has no interest and over which it can exercise no control. * * *"

The Court of Appeals, in its Summary Opinion† found that the foregoing conclusions of law of the District Court "rest upon a sound basis".

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*R. 28a-29a.

†Petitioner's Brief, Appendix "A".

In the arguments below, Petitioners claimed an *equitable lien* and cited *Belknap Hardware and Manufacturing Co.* v. *Ohio River Contracting Co.*, 271 Fed. 144 (6th Cir.); *Seaboard Surety Co.* v. *Spear*, 119 F. 2d 849; *Henningsen* v. *United States Fidelity & Guaranty Company*, 208 U. S. 404, 28 S. Ct. 389, 52 L. E. 547; and *United States* v. *Munsey Trust Co.*, 332 U. S. 234, in support of their contentions.

In *Bank of Arizona* v. *National Surety Corporation*, 237 F. 2d 90 (9 Cir., 1956), the Court of Appeals thoroughly discussed the application of the Miller Act and the theory of "equitable liens", cited and analyzed all the pertinent authorities (including the *Belknap, Henningsen* and *Munsey Trust Co.* cases, *supra*), held that whatever "equitable lien" may perhaps exist under the *Belknap* and *Munsey Trust Co.* cases is specifically limited to those cases where the *contract proceeds are in the control of the United States*, and came to the same conclusion as the District Court and the Court of Appeals below.

The present case is even one step further removed from the *Bank of Arizona case*, since no contract proceeds under the control of the United States are involved and no contract proceeds representing money paid by the United States to the contractor are involved—the only money involved is the balance of $20,000 paid by Bateson into Court in settlement of a private litigation with Davis. Petitioners have *neither* shown nor alleged that the $20,000 was derived, in whole or in part, from the contract between Bateson and

the United States.* It was purely a payment made by Bateson to Davis in settlement of a breach of contract suit, and, as such, is wholly unrelated to, and distinct from, any payments which may or may not have been made by the United States to Batson in connection with Bateson's Government contract.

3. Neither the Common Law nor the Statutes of Kentucky create an equitable lien in favor of Embry Bros.

(a) No Mechanics or Materialmen's liens exist at Common Law.

Embry Bros. assert that the contracts were executed and performed in Kentucky and claim that they are entitled to a lien under Kentucky law. If Embry Bros. are entitled to any lien under Kentucky law it must be a *statutory* lien as no such right ever existed at Common Law or in equity. In *Powers* v. *Brewer,* 238 Ky. 579, 584, 38 S. W. 2d 466, the Court of Appeals said:

> "Although mechanic's liens were clearly defined and regulated in the civil law they were *not recognized at common law nor allowed in equity,* and therefore in this country the right to acquire and enforce such a lien is a creation of and dependent upon statute."

The United States District Court for the Western District of Kentucky has also recognized that mechanics' liens are purely statutory:

> "Such liens were clearly defined and regulated in the civil law, but found neither life nor vitality

*R. 16a-20a.

in the common law or equity. The right in Kentucky is purely statutory and, unless the facts bring the claimant reasonably within the terms of the statute, no lien exists." *In re Louisville Daily News & Enquirer*, 20 F. Supp. 465, 566; *Granger & Co.* v. *Riley*, 201 F. 901 (6 Cir.).

(b) The Kentucky Mechanics and Materialmen's Lien Statutes grant no lien to Embry Bros. as a claim for rent due the owner of leased equipment is "not a lienable claim" under Kentucky Statutes.

Embry Bros.' claim is for unpaid rental of equipment (R. 16a-20a). This is their *sole* claim and is the *only* basis for their claim to a lien. **But this is completely fatal to their cause as under the Kentucky Mechanics and Materialmens' lien statutes a claim for rent due to the owner of leased equipment is "not a lienable claim under our statutes."** *Steele & Lebby* v. *Flynn-Sullivan Company*, 245 Ky. 772, 776, 54 S. W. 2d 325; *Henry Bickel Co.* v. *National Surety Co.*, 156 Ky. 695, 161 S. W. 1113, 1114; *Century Indemnity Company of Chicago, Ill.* v. *Shunk Mfg. Co.*, 253 Ky. 50, 68 S. W. 2d 772; *Marion Steel Shovel Company* v. *Union Indemnity Company*, 255 Ky. 817, 75 S. W. 2d 541; *Thew Shovel Company* v. *Massachusetts Bonding & Insurance Co.*, 261 Ky. 712, 88 S. W. 2d 960.

THIRD POINT.

Petitioners May Not Raise for the First Time in Their Petition for Certiorari an Entirely New Question Not Presented to or Considered and Decided by the District Court and the Court of Appeals.

Petitioners now claim for the first time that the fund paid into Court by the general contractor (Bateson) belongs to them as third party beneficiaries of a contract between Bateson and Davis. This is a new question presented for the first time. This issue was not made in the trial court or on appeal to the Court of Appeals and the Court's judgment did not include any ruling on this issue. It is too late to raise such an issue on appeal or in a Petition for Certiorari. *Helvering* v. *Wood,* 309 U. S. 344, 349; *Helvering* v. *Tex-Penn,* 300 U. S. 481, 498; *General Utilities Co.* v. *Helvering,* 296 U. S. 200, 206, 207; *Hormel* v. *Helvering,* 312 U. S. 552; *DeWaters* v. *Macklin Co.,* 167 F. 2d 694, 699 (6 Cir.); *Delta Drilling Co.* v. *Arnett,* 186 F. 2d 481, 486 (6 Cir.).

CONCLUSION.

The issues decided in the District Court and affirmed by the Court of Appeals include no special or important questions of such public or private importance as to justify a review on Writ of Certiorari.

Even if some theory of a moral or equitable obligation on the part of the Government to see that suppliers of labor and materials to a subcontractor of a prime

contractor working on a government contract is so important as to justify review by certiorari, such moral or equitable obligation on the part of the Government can apply only to payments made from money withheld by the Government out of proceeds of contract moneys it owes to the prime contractor, and no extension of this by a United States Court is possible where such extension would conflict with the laws of Kentucky. *Guaranty Trust Co.* v. *York,* 326 U. S. 99; *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64; *Assn.* v. *Gates,* 66 F. Supp. 706.

The Petition for Writ of Certiorari should be denied.

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